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No. 82-147

IN THE

Supreme Court of the United States

October Term, 1982

JOHN MUZH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED.

1. Whether a charge of possession and receiving of stolen property from interstate commerce can be sustained against an accused when the evidence reveals that law enforcement agents had intercepted the stolen property prior to its delivery to the accused, thus terminating its status as "stolen property?"

2. Whether recovery of allegedly stolen goods by law enforcement authorities on behalf of the owner, which has occurred prior to its delivery to the accused-receiver, precludes prosecution for receiving and possessing of stolen property?

3. Whether it was possible for petitioner Muzii to have performed the *"actus reus"* of receiving and possessing stolen goods, in view of the fact that

they had previously been recovered by law enforcement agents prior to their delivery to petitioner?

PARTIES.

The parties in the United States Court of Appeals for the Second Circuit were the petitioner and the United States of America.

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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term 1982

- X

JOHN MUZII,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

- X

PETITION FOR A WRIT OF CERTIORARI.

OPINION BELOW.

A copy of the opinion of the United States Court of Appeals for the Second Circuit, rendered the 19th day of April, 1982, is annexed hereto as an appendix.

JURISDICTION.

A) The judgment of conviction was rendered the 15th day of October, 1981, in the United States District Court for the Eastern District of New York, following a trial before Sifton, D.J., and a jury, and convicted petitioner of receiving and possessing stolen property and conspiracy to do so (18 U.S.C. §§ 659 and 371). The petitioner was sentenced to concurrent terms of 2 years imprisonment and fines totalling $20,000.00.

It was alleged in the indictment that the petitioner, a pharmacist, conspired with certain individuals, including undercover police officers, to buy certain stolen pharmaceuticals (not narcotics or scheduled drugs), which had been purloined from Kennedy Airport cargo areas by other persons.

B) The order of affirmance of the United States Court of Appeals for the Second Circuit is dated the 4th day of September, 1981, and is annexed as part of the appendix hereto.

The order denying a rehearing was filed by the United States Court of Appeals for the Second Circuit on the 2nd day of June, 1982, a copy of which is annexed hereto as part of the appendix.

C) The jurisdiction to review the judgment in question by certiorari is conferred under 28 U.S.C. §§ 1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED HEREIN.

The Fifth Amendment of the United States Constitution, as well as Section 659 of Title 18 of the United States Code, are involved herein.

So far as pertinent, the Fifth Amendment of the United States Constitution alleges:

> "No person shall be * * * deprived of his life, liberty, or property, without due process of law."

Section 659 of Title 18 of the United States Code provides, so far as relevant:

> "Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen.
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

STATEMENT OF THE CASE.

This case, we believe, *presents a conflict among the Circuits* as to the interpretation of criminal liability in connection with receiving and possessing stolen property which has been recovered by law enforcement agents prior to its delivery to the accused.

In the case at bar, New York City detectives, namely Richard Marrone and Samuel Velez, established themselves at Kennedy Airport as owners of a trucking company, but, in actuality, were investigating thefts of cargo from Kennedy Airport. They called their firm "Inner City Trucking Inc.," (hereinafter "ICT").

Two individuals by the name of Simonetti and Vullo contacted ICT with a plan to dispose of stolen cargo, indicating they wanted to use ICT as a drop.

It is important to recognize that Simonetti, who was a truck driver with "Imperial Air Freight" (hereinafter "IAF"), and Vullo, who worked for "Profit By Air Company" (hereinafter "BA"), stole certain cargo and delivered the items to ICT without any specific consignee in mind. The labels on the cartons were altered and, in some instances removed, by the detectives, and the contents inventoried.

Among the items stolen by Vullo and Simonetti were not only pharmaceuticals, but also firearms and other items.

After some discussion, it was decided to try to sell these items to Muzii. Simonetti happened to mention the fact that he knew a druggist who might be able to get rid of certain pills (Tr. 131). Labels had been changed and/or cut off and only some of the stolen cargo was ultimately delivered to Muzii.

The police obtained full possession and control of the cargo before a portion thereof was ultimately delivered to Muzii's firm.

POINT I.

SINCE IT IS NOT DISPUTED THAT THE STOLEN GOODS IN QUESTION WERE FIRST DEPOSITED WITH LAW ENFORCEMENT AGENTS AT JOHN F. KENNEDY AIRPORT, AND WHILE IN THEIR CUSTODY THE LABELS ON CARTONS IN WHICH THE STOLEN ITEMS REPOSED WERE ALTERED, AND IN SOME CASES REMOVED, IT WAS THUS IMPOSSIBLE FOR MUZII TO BE CONVICTED OF RECEIVING AND POSSESSING STOLEN PROPERTY, BECAUSE OF THE FACT THAT ONCE THESE ALLEGEDLY STOLEN GOODS CAME INTO THE CUSTODY OF LAW ENFORCEMENT AGENTS, THEY LOST THEIR CHARACTERISTICS AS STOLEN PROPERTY.

The law enforcement agents who effectuated the arrest of petitioner had set up a phony corporation at John F. Kenndey International Airport, known as "Inner City Trucking Inc." (ICT), which was a ruse whereby they hoped to uncover persons or

corporations involved in cargo thefts from the airport.

Ralph Simonetti, a truck driver with IAF, and Dominick Vullo, employed by PBA, established a scheme with the operators of ICT, all of whom were detectives, to use ICT as a drop for stolen cargo.

The efforts of Vullo and Simonetti resulted in the theft of pharmaceuticals, firearms, and other items, from cargo areas of the airport. These items were brought to ICT and, in many instances, the cartons were altered and labels in some cases were removed. No known consignee of these items, in the sense of a receiver of stolen property, was in mind at the time the items were delivered to ICT, but only subsequently was it decided to try to sell these to Muzii, after Simonetti recollected that perhaps Muzii

might be inclined to buy them. The stolen merchandise, therefore, was fully recovered by police agents, since all of ICT personnel were city detectives.

The Second Circuit's opinion that a very limited observation was made by the detectives at ICT, is not borne out by the facts of the case, and it is obvious that in view of the recovery of the stolen merchandise by law enforcement agents, its characteristics as "stolen property" ceased.

In *United States v. Monasteraki*, 567 F.2d 677 (6 Cir. 1977), the Court clearly reveals that under similar circumstances no charge of receiving and possessing stolen property can exist.

In *Regina v. Schmidt*, L.R. 1, Cr. Cas.Res. 15 (1866), and *Regina v. Dolan*, 29 Eng.Law & Eq. 533 (1855), the precedent was established that once actual or

constructive possession of stolen goods is acquired by the owner or his agent, which includes the police, there can no longer be any conviction for receiving or possessing stolen goods.

In *United States v. Egger*, 470 F.2d 1179 (9 Cir. 1972), a case upon which the Second Circuit relies, there is a clearly distinguishing factor, because in the *Egger* case the police agents merely recorded serial numbers of stolen currency which were turned over in short order to a dishonest attorney by the name of Egger. The defendant, Egger, knew that he was taking possession of money stolen in a bank robbery, and there was no question at any time but that Egger was the ultimate consignee of this money.

Moreover, the mere recording of the serial numbers was the only thing that the police officers did in *Eggers*.

In the case at bar, of course, there was no known consignee at the time the items were stolen and delivered to ICT, and there were alterations made on the labels and the cartons and not all of the stolen property was even sold to petitioner. There was far more than mere observations made by the police and thieves. They conspired about how and where to dispose of the property, set up contrived phone calls and meetings and so forth.

In *Monasterski*, however, after interpreting and rejecting the reasoning in *Egger*, the Court cogently explained (*id.* 567 F.2d at 683):

> "We are very sympathetic to the Government's desire to apprehend fences. Their social disutility is notorious. We cannot agree with the Government's position in this case, however, and are unpersuaded by Egger. The Government's arguments ignore the relevant

statutory requisite of stolen goods. We fully realize that the beneficiaries of the rule espoused here likely have the precise culpable state of mind required for conviction of receiving stolen goods. Our law does not punish bad purpose standing alone, however; instead we require that *mens rea* accompany the *actus reus* specifically proscribed by statute. It is one of the most fundamental postulates of our criminal justice system that conviction can result only from a violation of clearly defined standards of conduct. We must apply this principle evenhandedly and not be swayed by our attitudes about the moral culpability of a particular defendant. It is the function of legislatures, not courts, to condemn certain conduct. Petitions to punish reprehensible conduct must be addressed to the Congress and not this Court. Being bound by the current statutory language, this case simply does not involve the proscribed criminal act."

The Court in *Monasterski* continued:

> "The statement in *Egger* that this result is a 'fringe benefit for criminals' begs the question, for one is not a criminal until he combines the requisite *mens rea* and *actus reus*. *Egger* also falls short in its statement that the FBI agents in that case never assumed 'actual, physical possession' of the stolen money even though they counted and inventoried it. On oral argument before this Court counsel for the Government conceded this statement was based upon tortured reasoning. We agree.
>
> We see at least three alternatives open to the Government in its attempt to apprehend fences when faced with facts like those here. *First*, it can petition the Congress for a statute clearly drawn to encompass the disfavored activity. *Second*, it can employ the method approved in *Copertino* of surveilling the stolen goods until delivered to the fence. *Third*, the Government can charge fences under 18 U.S.C. §371, the general conspiracy

> statute in cases where it can show the necessary elements of a conspiracy. The Government may not be enthusiastic about any of these proposed alternative courses but the record in this case and the current state of the law cannot yield the result it desires." (Footnotes omitted). (Emphasis ours.)

In *United States v. Dove*, 629 F.2d 325 (1980), the Fourth Circuit adopted a similar position to that of the Court in *United States v. Monasterski*.

In *Dove* the Court held that where undercover agents bought an automobile from a thief with funds provided to him by the F.B.I., and where that automobile sat on a used car lot being operated by the undercover agent in the actual and exclusive possession of the F.B.I. and its agent for a period of time, the automobile had lost its status as "stolen," so that the defendant, although

undoubtedly believing that he was buying a stolen automobile, could not be convicted of transporting it in interstate commerce as a stolen motor vehicle (18 U.S.C.A. §2312).

In *Dove*, the Court stated (*id.* 629 F.2d at 329):

> "We look instead to the purpose of the rule and of the distinction between 'recovery' and 'observation.' *There must come a time when goods recaptured by the police cease being 'stolen' in contemplation of the law.* On the other hand, that principle should not be applied in such a way that 'the difficulties in apprehending criminals in cases such as this would be immeasurably increased, and without reason.' *Copertino*, 256 F. at 52."

In *Dove*, the opinion of Judge Russell, concurring and dissenting, concedes that where actual physical possession of the goods in question is obtained by the

police, it loses its characteristic as stolen property.

While we have maintained that in New York the Second Circuit has apparently not ruled on this particular issue until now, the case of *People v. Jaffe* (1906), 185 N.Y. 497, adopts a rule similar to that in *Monasterski*, and we maintain that this Court should give careful consideration to that opinion.

In *People v. Rojas*, 55 Cal. 2d 252, 358 P.2d 921, 85 A.L.R.2d 252, the Supreme Court in California adopted a similar rule to that of *Jaffe* and *Monasterski*.

United States v. Cohen, 274 F. 596 (3d Cir. 1921), is often cited as a leading case in the more modern history of the rule. The facts of *Cohen*, legally indistinguishable from this cause, involved a case of goods which had been diverted from its proper course and re-

addressed so that it would be delivered to the defendant. A suspicious employee of the carrier, however, turned the case over to his superiors. The carrier's detectives ordered that the case be delivered to the altered address, which led to the defendant's arrest and conviction for receiving stolen goods under the predecessor to 18 U.S.C. §659. Citing and relying upon *Schmidt*, *Dolan*, *Jaffe*, *DeBare* and *Copertino*, the Court reversed the conviction and expressed the following rule:

> "When the *actual, physical possession* of stolen property *had been recovered* by the owner or his agent, its *character as stolen property is lost*, and the subsequent delivery of the property by the owner or agent to a *particeps criminis*, for the purpose of entrapping him as the receiver of stolen goods, does not establish the crime, for

> in a legal sense he does not receive stolen property." (Emphasis ours.) 274 F. at 599.

In *Monasterski* the Court quoted with approval *United States v. Cawley*, 255 F.2d 338 (3 Cir. 1958).

In *Cawley, supra*, two thieves were apprehended by postal inspectors in the process of stealing several packages from a railroad shipment. The thieves and packages were taken to the post office and the packages were inventoried. The thieves agreed to cooperate with the inspectors in carrying out their intended plan to sell the packages to the defendant. The defendant, unaware of their apprehension, bought the packages from the thieves under circumstances justifying the inference he knew they were stolen. He was convicted of receiving packages known to be stolen from the mails,

in violation of 18 U.S.C. §1708. *The Government conceded* and the Court agreed "that it is a legal principle of long standing that when stolen goods are recovered by the owner or his agent before they are sold, the goods are no longer to be considered stolen, and the purchaser cannot be convicted of receiving stolen goods. 255 F.2d at 340 (footnote omitted)". *Cawley, supra*, at 339 d 255 F.2d.

In *United States v. Monasterski, supra*, the Court at 681 of 567 F.2d explained *Cawley* as follows:

> The Government argued in *Cawley*, however, that the rule did not help the defendant there because the packages were stolen from the railroad and then recovered by postal inspectors who were not agents of the railroad. This, the Government argued, meant the packages had not been recovered by their owner or his agent and thus retained their stolen character even after

> recovery by the postal inspectors. The Court rejected out of hand this reading of the rule. It held that for purposes of the rule the postal inspectors were agents of the owner. The rule applied whenever the stolen goods were 'received by the owner or anyone who has a right to possession or control over them. See *Regina v. Schmidt*, * * *.' *Id.* See also, *People v. Rojas*, 55 Cal. 2d 252, 10 Cal. Rptr. 465, 358 P.2d 921 (1961). On this reasoning the Court reversed the conviction.
>
> The above cases present this Court with substantial authority pointing toward reversal in this case. In the absence of binding authority however, it is incumbent upon us to undertake an independent review of the rule in question. We conclude that the rule withstands analysis and we adhere to it."

See also, *United States v. Bryan*, 483 F.2d 88, 91 (3 Cir. 1973), and *cf.* *United States v. Hair*, 356 F. Supp. 339 (D.D.C. 1973).

In the case at bar there is some question as to whether or not the petitioner knew that the items were stolen because there is testimony from Detective DeVito and from the mailman Wakuluk that petitioner thought he was buying distressed items that would be put up for auction.

It is irrelevant, however, whether or not he thought they were stolen, because they in fact could not be stolen, as we shall explain, *infra*.

It does not appear that any decisions in the Second Circuit have been rendered on this particular issue until now.

In *United States v. Monasteraki*, 567 F.2d 677 (6th Cir. 1977), the Court of Appeals came to the conclusion that one cannot be convicted of receiving stolen goods when actual physical posses-

sion of such stolen goods has been recovered by their owner or his agent before delivery to the intended receiver. In such connection, the Court explained the term "agent" means any person with right to possession or control over such goods, and specifically *includes the police* (18 U.S.C.A. §659):

> "Under the plain terms of the relevant portion of this statute, one can be convicted only if the Government proves beyond a reasonable doubt that, *inter alia*, the defendant bought, received or possessed stolen goods or chattels.
>
> The rule that one cannot be convicted of receiving stolen goods if, before the stolen goods reached the would-be receiver, the goods had been recovered by their owner or his agent had its genesis in two nine-tenth century English cases. *Regina v. Schmidt*, L.R. 1 Cr.Cas.Res. 15 (1866); *Regina v. Dolan*, 29 Eng. Law & Eq. 533 (1855).

The rule in *Schmidt* and *Dolan* has been almost universally adopted by the state courts in this country presented with the same question. A leading early state court case on point is *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906). In *Jaffe*, the New York Court of Appeals considered whether one could be convicted of an attempt to receive stolen goods when the goods in question had been restored to their owner and actually delivered to the defendant by their owner. *The Court held that the attempt conviction was bad because the underlying offense of receiving stolen goods was impossible since the goods had been recovered by their owner.* The Court noted that the defendant had the requisite criminal intent but that he could not know the goods were stolen, as required by statute, since, in fact, they were not stolen. *The Court added that the reprehensible nature of one's actions is irrelevant in a criminal case if one has not done the act forbidden by the law."* (Emphasis ours.)

In the case at bar it is obvious that since Marrone and Velez and the others in the warehouse at ICT were police officers, that they had physically obtained possession of the stolen cartons. The cartons were not merely inventoried, but they were checked out and labels removed, and it was not exactly known to whom they were going to be delivered until certain calls were made by Simonetti at the urging of the police who acted in an undercover capacity.

This is not the same as a situation where the F.B.I. merely takes the serial numbers of certain bills that are in transit.*

In the *Monasteraki* case, *supra*, the Court went on to explain (*id.* 567 F.2d at 680):

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* *Cf: United States v. Egger*, 470 F.2d 1179 (9 Cir. 1972), *supra*.

> "The earliest apposite reported federal case our research as uncovered is *United States v. DeBare*, 25 F. Cas. 796 (No. 14,935) (D.C.E.D. Wis. 1875). In *DeBare*, postage stamps had been stolen by a thief who intended to purvey them to the defendant. The thief was caught, however, and the stamps returned to the local postmaster. Pursuant to a scheme not unlike that in the instant case, the stamps were subsequently sent along to the defendant, who was charged with receiving stolen goods. The District Court noted that the defendant's *mens rea* was precisely that required for conviction under the statute but held that the defendant had not committed the forbidden act. Under the authority of *Schmidt* and *Dolan*, the Court held that the recovered stamps had lost their status as stolen goods and thus could not support a conviction."

A Third Circuit case, *Copertino v. United States*, 256 F. 519 (3 Cir. 1919), is distinguishable from the case at bar.

In *Copertino*, railroad police discovered the theft of certain goods and found where they were hidden. They did not actually seize the goods, however, but rather one officer surveilled the goods while another sought assistance. While merely watching the goods from a distance, the officer observed the defendant loading the contraband into his automobile. The defendant urged upon the Court the rule laid down in *Schmidt*, *Dolan*, *Jaffe* and *DeBare*. While the Court "readily concede[d] that the principle invoked is a sound one," *id.* at 521, it found the principle to be of no help to the defendant. The missing element for invoking the rule was actual or constructive possession of the stolen goods by the owner or his agent. The mere surveillance of the goods did not constitute actual or constructive possession

by the owner or his agent so the rule did not apply.

In view of the foregoing principles as set forth in cases from several Circuits, we maintain that the Court below in the case at bar, namely the Second Circuit, has misinterpreted the thrust of the rule that appears to be established as far back as the English precedents, namely that once allegedly stolen merchandise is recovered by the owner or by the police (who are deemed agents of the owners), that such merchandise automatically loses its characteristics as "stolen" property and, consequently, a charge of possession and receiving such "stolen" property cannot be sustained.

The Second Circuit herein erroneously determined that this case was apposite to *Egger, supra*, and *Copertino, supra*, but, in fact, it is quite distinguishable

since a great deal more dominance over the allegedly stolen merchandise was exercised herein than either of those cases.

Furthermore, as we have already indicated, Muzii was determined as the ultimate receiver only after the property in question was already in the hands of the police and substantial changes were made in the packages themselves by altering or removing labels.

CONCLUSION.

The petition for certiorari should be granted and this Court should hold that the order and judgment below should be reversed on the grounds that once stolen property has been recovered by the police, a charge of receiving and possessing such property, as "stolen"

property, cannot be sustained, because the recovery thereof destroys the status of such property as "stolen."

Respectfully submitted,

IRVING ANOLIK,
Attorney for Petitioner.

CERTIFICATION.

I, IRVING ANOLIK, a member of the bar of this Court, certify that on the 26th day of July, 1982, five (5) copies of the within Petition for Certiorari were served upon the attorney for respondent, namely the Solicitor General of the United States, by servicing true copies thereof upon the Solicitor General of the United States, at the Department of Justice, Washington, D. C. 20530, by first class mail.

IRVING ANOLIK

APPENDIX.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of April, one thousand nine hundred and eighty-two.

PRESENT:

HON. IRVING R. KAUFMAN,

HON. ELLSWORTH A. VAN GRAAFEILAND,

Circuit Judges.

- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN MUZII,

Defendant-Appellant.

No. 81-1443.

- X

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this Court.

A. DANIEL FUSARA,
Clerk

by Francis X. Gindhart
Chief Deputy Clerk

ORDER DENYING REHEARING.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 2nd day of June, one thousand nine hundred and eighty-two.

- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN MUZII,

Defendant-Appellant.

No. 81-1443.

- X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

counsel for the defendant-appellant, John Muzii,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by:

Francis X. Gindhart
Chief Deputy Clerk

FILED: JUN 2 1982
A. Daniel Fusaro, Clerk
United States Court of Appeals
Second Circuit

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 848—August Term, 1981

(Argued April 12, 1982 Decided April 19, 1982)

Docket No. 81-1443

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN MUZII,

Defendant-Appellant.

Before:

KAUFMAN and VAN GRAAFEILAND,

*Circuit Judges.**

* With the consent of the parties, pursuant to Rule 0.14 of the Rules of the Second Circuit, this appeal was heard by a panel of two judges. Judge William H. Timbers was scheduled to participate, but was indisposed.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Charles P. Sifton, *Judge*), convicting Muzii of two counts of receiving and possessing goods moving in interstate commerce with a value of more than $100.00, knowing the goods to have been stolen, in violation of 18 U.S.C. § 659, and one count of conspiracy to receive and possess such goods, in violation of 18 U.S.C. § 371.

Affirmed.

IRVING ANOLIK, New York, New York, *for Defendant-Appellant.*

JOHN B. LATELLA, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York (Edward R. Korman, United States Attorney for the Eastern District of New York, Vivian Shevitz, Assistant United States Attorney for the Eastern District of New York, of counsel), *for Appellee.*

KAUFMAN, *Circuit Judge:*

The reach of the criminal law has long been limited by the principle that no one is punishable for his thoughts.[1] Accordingly, not only has a criminal state of mind, or mens rea, been a general condition of penal liability,[2] but

1 S. Kadish & M. Paulsen, Criminal Law and its Processes 207 (1969).

2 Despite the long-standing commitment of traditional Anglo-American criminal jurisprudence to the requirement of *mens rea*, there have

the imposition of the criminal sanction has required a guilty act, or *actus reus*, by the person sought to be held liable. This act must be contemporaneous with the guilty mind. The *actus reus* requirement has been justified on the grounds that it is difficult to distinguish between mere day-dreams and resolute intention in the absence of some physical act or behavior, and that an attempt to punish evil thoughts alone would cast the net of the criminal law too widely.[3] The *actus reus* must have its origin in some willed activity or omission on the part of the defendant. Moreover, the guilty act cannot exist in the absence of the surrounding circumstances and consequences associated with the offense forbidden by law.[4] In this case, we are asked to determine whether the circumstances concerning the Government's method of detecting the crimes charged in the indictment operated to preclude the commission of a guilty act. Specifically, we must decide if the activities of detectives engaged in an undercover operation resulted in the recovery of stolen pharmaceuticals by the owner or his agent prior to delivery of the stolen drugs to appellant, thereby causing the goods to lose their stolen character and rendering appellant incapable of committing the guilty act of receiving stolen property. We turn now to the facts of this case.

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been departures from it in a number of situations. The felony-murder and misdemeanor-manslaughter doctrines, and statutes defining as criminal offenses bigamy and sexual acts with minors provide examples of crimes for which a *mens rea* requirement has been eliminated. *See S. Kadish & M. Paulsen, supra,* note 1 at 247. The acceptance of strict criminal liability for violations of regulatory statutes represents another departure from the *mens rea* principle. *See* Campbell, *A Strict Accountability Approach to Criminal Responsibility,* 29 Fed. Prob. 333 (1965).

3 G. Williams, Criminal Law 2 (2d ed. 1961).

4 Id. at 16.

John Muzii appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York after a jury trial before Judge Charles P. Sifton. Muzii was convicted of two counts of receiving and possessing goods moving in interstate commerce with a value of more than $100.00, knowing the goods to have been stolen, in violation of 18 U.S.C. § 659, and one count of conspiracy to receive and possess such goods, in violation of 18 U.S.C. § 371. Judge Sifton sentenced Muzii to concurrent terms of imprisonment of two years on each of the three counts, fines of $5,000 on each of the substantive counts and a fine of $10,000 on the conspiracy conviction, for a total fine of $20,000. On appeal, Muzii raises several claims, the only serious one of which is that at the time the stolen pharmaceuticals came into his possession, they had lost their character as stolen property as a result of the participation of undercover agents working on the case. For the reasons stated below, we reject Muzii's contentions, and affirm the judgment of conviction.

This case is the result of a carefully orchestrated undercover operation. In 1976, the New York City Police Department initiated an investigation designed to apprehend those responsible for the theft of cargo from airline carriers at John F. Kennedy International Airport in New York. To establish a base for infiltrating the ranks of truck drivers and warehousemen involved in the thefts, the Department operated a trucking company, known as Inner City Trucking, Inc., and staffed by both the detectives from the New York City Police Department and by agents of the United States Customs Service. Working undercover, the detectives and agents were able to obtain information concerning cargo thefts at the Airport. The law enforcement officers utilized the facade of a legitimate business to facilitate their operation.

Two New York City detectives, Richard Marrone and Samuel Velez, held themselves out as the owners of the trucking company. Through their undercover work, they met Ralph Simonetti, a truck driver for the Imperial Air Freight Company. Between 1977 and 1979, Simonetti spoke to Velez on the topic of cargo thefts on numerous occasions, and brought several shipments of stolen goods to Velez and Marrone at the trucking company. In the spring of 1979, Simonetti asked Velez and Marrone if he could use the trucking company's warehouse as a "drop" for a shipment of stolen ulcer pills before delivering them to the ultimate purchaser. Velez expressed his assent. On June 14, 1979, Simonetti introduced Domenick Vullo, a truck driver for Profit By Air, Inc., to detectives Marrone and Velez, and arrangements were made for the delivery of the stolen pharmaceuticals. Vullo delivered the drugs on June 20.[5] On the next morning, Ralph Simonetti arrived at Inner City Trucking, Inc., to inspect the stolen drugs. Simonetti placed a call to John Muzii, a druggist in the Bronx, from the business office of the trucking company for the purpose of making arrangements for delivery of the drugs. Later that morning, Simonetti and Gerald Weiss loaded the boxes of stolen drugs into Simonetti's car, and stated that they would deliver the goods to the druggist. Later, Simonetti called Detective Marrone at the trucking company to inform him that the transaction had been completed, and, on June 25, met with Marrone to pay him $1000 as his share of the proceeds earned from the sale to Muzii.

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5 At trial, the parties stipulated that these drugs had been stolen from Profit By Air, Inc., a cargo carrier at JFK International Airport which employed Vullo, that the drugs had been part of a shipment in interstate commerce, and that the value of the stolen pharmaceuticals exceeded $50,000.

On July 18, 1979, Domenick Vullo brought another shipment of stolen pharmaceuticals to Inner City Trucking.[6] On the next morning, Simonetti and Weiss picked up the drugs from the trucking company, and drove to a Howard Johnson's restaurant in the Bronx, where they met John Muzii. Muzii left the restaurant a few minutes later, after engaging in a brief conversation with the pair. Alfred Lewis, an employee of the Muzii Drug Company, soon arrived at the restaurant in a car owned by John Muzii. After speaking briefly with Simonetti and Weiss, Lewis drove away in Simonetti's car, which contained the stolen drugs. Lewis then proceeded to an apartment building one block from the premise of the Muzii Drug Company, and unloaded the drugs from the car. Lewis returned to the Howard Johnson's Restaurant, spoke briefly with Simonetti and Weiss, and drove away in Muzii's car. On July 20, John Muzii and Ralph Simonetti met in a parking lot in Bayside, New York. A few days later, Simonetti delivered $1000 to Marrone and Velez as their share of the proceeds from the sale of the drugs to Muzii.

In October, 1979, Marrone and Velez revealed their true identities to Simonetti, and offered him an opportunity to cooperate. Simonetti agreed. Wearing a tape recording device, Simonetti met with Muzii at the Howard Johnson's Restaurant where the previous transaction had taken place. Their recorded conversation revealed certain details of the July 18th shipment and mentioned the possibility of another sale of stolen drugs.

A five count indictment was subsequently filed. John Muzii was charged in three counts. Domenick Vullo,

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6 The parties stipulated at trial that these pharmaceuticals had been stolen from Profit By Air, Inc., that the drugs had been part of a shipment in interstate commerce, and that the value of the drugs exceeded $60,000.

Gerald Weiss, and Ralph Simonetti was named as co-defendants. Muzii was indicted on two counts of receiving and possessing stolen pharmaceuticals worth more than $100 and moving in interstate commerce, knowing them to have been stolen, on June 21 and July 18, 1979, in violation of 18 U.S.C. § 659. Muzii was also charged with one count of conspiring with his co-defendants to commit such an offense, in violation of 18 U.S.C. § 371. While Vullo, Weiss, and Simonetti each pleaded guilty,[7] Muzii stood trial before Judge Charles P. Sifton in the Eastern District of New York. Trial commenced in August, 1981. The Government presented the testimony of Detectives Marrone and Velez, as well as Special Agents Victoria Ovis and Donald Grattan of the United States Customs Service, who had observed the transactions at the Howard Johnson's Restaurant and in the parking lot in Bayside, New York. The Government also introduced videotapes[8] of meetings involving Marrone, Velez, Sim-

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[7] Vullo pleaded guilty to the conspiracy count of the indictment and was sentenced to eighteen months in prison. Weiss also pleaded guilty to the conspiracy count, and was sentenced, pursuant to 18 U.S.C. § 3651, to serve six months of a two year prison term, with the balance of the sentence suspended, and two years' probation to follow. Simonetti pleaded guilty to one count of receiving and possessing stolen property in violation of 18 U.S.C. § 659, and was sentenced to a six year term of imprisonment.

[8] Recently, in *United States* v. *Alexandro*, No. 81-1435 (2d Cir. March 18, 1982), this Court considered and rejected a challenge to the conviction of an investigator with the Immigration and Naturalization Service for bribe receiving, conspiracy to receive bribes, and unlawful conflict of interest arising from an FBI Abscan investigation. In *Alexandro*, this Court held that the participation of Government agents, who made videotapes of meetings with the defendant, was not so excessively intertwined with the illegal scheme that due process prohibited the criminal prosecution of defendant. Since Muzii has not asserted that the activities of Marrone and Velez were so extensive and repugnant that his criminal prosecution violated due process and has not in fact challenged the admissibility of the videotapes, we need not apply these principles in this case.

onetti, and Weiss, and tape recordings of two conversations between Simonetti and Muzii. While Muzii did not testify in his own behalf, he presented the testimony of several character witnesses, who asserted that Muzii had an excellent reputation in his business community for honesty and truthfulness. Muzii also called to the stand a New York City police detective, who testified that he overheard a conversation between Muzii and Simonetti at a party in February, 1979, in support of Muzii's contention that he believed he was purchasing damaged or unclaimed drugs rather than stolen pharmaceuticals. The jury convicted Muzii on all three counts.

On appeal, Muzii's principal claim is that his conviction for knowingly receiving and possessing stolen pharmaceuticals in violation of 18 U.S.C. § 659 is invalid because the drugs had lost their status as stolen property before they were delivered to him.[9] Muzii argues that, because the stolen shipments had come into the physical possession of the undercover detectives overnight on June 20 and July 18, before Muzii received possession of them, the drugs had been "recovered" for their rightful owner and were no longer stolen. *See United States* v. *Monasterski*, 567 F.2d 677 (6th Cir. 1977). Accordingly, Muzii asserts, although he may have formed the requisite *mens rea*, or intent to receive stolen goods, he could not have performed the *actus reus* of receiving and possessing stolen goods due to the involvement of the undercover agents.

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[9] We note that even if the goods lost their stolen character prior to delivery to Muzii, which we decline to hold, Muzii could be convicted of conspiracy to receive and possess stolen property in violation of 18 U.S.C. § 371, since the evidence was ample to support the existence of a conspiracy. *See United States* v. *Egger*, 470 F.2d 1179, 1181 (9th Cir. 1972), *cert. denied*, 411 U.S. 949 (1973).

Our analysis of the relevant case law leads us to the conclusion that the brief custody of the goods by the detectives at the trucking company did not amount to "recovery" of the drugs for their rightful owner and eliminate the stolen character of goods. Rather, the use of the company's facilities as a "drop" for stolen pharmaceuticals merely facilitated surveillance of the unlawful transaction and enabled the detectives to apprehend the ultimate purchaser. The detectives did not convert their limited role of observation into "recovery" of the stolen goods, since at no time did they exercise control over the drugs on behalf of the rightful owner, act as the owner's agent to recover the goods, or direct their delivery to Muzii. The brief physical custody of the pharmaceuticals was no more than a small segment of the overall undercover scheme designed to ferret out criminal activities planned and executed by others.

Judicial precedent firmly supports the line we draw today between surveillance and recovery of stolen goods by undercover agents seeking to apprehend those involved in the sale and purchase of such property. The proposition that one cannot be convicted of receiving stolen goods if, before the stolen goods reached the receiver, the goods had been recovered by their owner or his agent, including the police, is traceable to two nineteenth century English cases. *See Regina* v. *Schmidt,* L.R. 1 Cr.Cas.Res. 15 (1866); *Regina* v. *Dolan,* 29 Eng.Law & Eq. 533 (1855). Later courts properly stressed that the essential condition for invoking this rule is actual or constructive possession of the stolen goods by the owner or his agent; mere surveillance or observation of the goods does not constitute actual or constructive possession. *See United States* v. *Monasterski, supra,* 567 F.2d at 680, 684. In *Monasterski,* Conrail police apprehend three youths who had

stolen tires from a Conrail boxcar in a railroad yard. In an effort to capture the intended "fence," the Conrail police assisted in the transfer of the stolen tires to the defendant, and in fact supplied a van for their transport. The Sixth Circuit concluded that the stolen tires were recovered by their rightful owner and were delivered at the direction of the owner and law enforcement officials. Accordingly, the apprehended youths were no longer acting as participants in a criminal enterprise, but were agents for the police and Conrail, the rightful owner of the tires. Since the youths were acting under the authority of the owner who had recovered the goods, the Court held that the goods had lost their stolen character and the defendant, therefore, could not be convicted of knowingly receiving and possessing stolen goods, in violation of 18 U.S.C. § 659. *Id.* at 684. *See also United States* v. *Cawley,* 255 F.2d 338 (3d Cir. 1958) (mail had lost stolen character because, prior to delivery to defendant, postal inspectors with duty to recover mail solicited thieves to continue with their original design after their apprehension); *United States* v. *Cohen,* 274 F. 596 (3d Cir. 1921) (goods recovered by rightful owner prior to delivery to defendant).

When law enforcement officers have merely engaged in the surveillance of stolen goods before their delivery to a "fence," courts have uniformly concluded that the property did not lose its stolen character, and the receiver of such property has committed the *actus reus* of receiving and possessing stolen goods. The Fourth Circuit, in *United States* v. *Dove,* 629 F.2d 325 (4th Cir. 1980), recognized the distinction between the actual recovery of stolen goods by or on behalf of the owner and the mere observation of stolen goods for the purpose of apprehending the individual who ultimately receives them. In

Dove, the Court concluded that where the possession of stolen bulldozers by the undercover agent was not for recovery by the owner but was an integral part of the overall criminal design, the agent's conduct in the theft and subsequent sale was considered an act of observing the criminal activities. *Id.* at 329. *See also United States* v. *Egger*, 470 F.2d 1179 (9th Cir. 1972) (counting the stolen money and recording of serial numbers in presence of Government agents did not eliminate stolen character of money since actions of Government agents were a form of surveillance and observation rather than possession on behalf of the rightful owner), *cert. denied*, 411 U.S. 949 (1973); *Copertino* v. *United States*, 256 F. 519 (3d Cir. 1919) (surveillance of stolen copper bars from a distance did not constitute actual or constructive possession of the bars by the owner or his agent); *Barnes* v. *United States*, 313 A.2d 106 (D.C. App. 1973).

With these principles in mind, we conclude that the conduct of the detectives working undercover at Inner City Trucking constituted nothing more than observation or surveillance of the stolen pharmaceuticals, and accordingly did not eliminate the stolen character of the goods. Detectives Marrone and Velez were not instrumental in causing, nor did they attempt to cause, the delivery of the two shipments of drugs to Muzii. Furthermore, they were not operating under the authority or direction of the rightful owner in an attempt to entrap the receiver of the stolen goods. The undercover agents simply provided a convenient "drop" for Simonetti and his confederates to use before delivering the drugs to Muzii. They did not solicit Simonetti's cooperation in transferring the drugs to appellant, and Simonetti was not working under their direction when Muzii received the drugs. The detectives did no more than provide a place to store the stolen drugs

for a single night where they could be observed while Simonetti independently made arrangements for delivery to Muzii. Accordingly, we reject Muzii's contention that the activities of the detectives precluded his commission of the *actus reus* of receiving and possessing stolen goods in violation of 18 U.S.C. § 659. Any other result would unreasonably impair the ability of law enforcement officials to apprehend "fences" for stolen property.

Since Muzii's other claims are completely without merit,[10] we affirm the judgment of conviction in all respects.

[10] On appeal, Muzii has raised three additional claims: that the tape recordings of conversations between Simonetti and Muzii should have been ruled inadmissible because the recordings were made without court order and violated Muzii's expectation of privacy; that his conviction should be reversed and the indictment dismissed on the ground that his due process rights were violated by pre-indictment delay; and that the jury's verdict was not supported by the evidence. Since these claims are completely lacking in merit, we shall not discuss the reasons for rejecting them.

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